

COURT REFORM COUNCIL
ADMINISTRATIVE PROCEDURE ACT SUBCOMMITTEE

Meeting #1
June 22, 2017 at 9:00 AM
State Capitol, 206 Washington Street SW, Atlanta, Georgia
Room 133

MINUTES

At 9:00 AM, Chief Judge Michael Malihi called the first meeting of the Court Reform Council's APA Subcommittee to order and initiated introductions.

Judge Malihi gave brief introductory remarks about the subcommittee's purpose. Lisa Boggs, general counsel for the Office of State Administrative Proceedings (OSAH) next gave a brief presentation highlighting seven possible areas of reform within the APA: (1) final decision authority; (2) judicial review; (3) jurisdiction; (4) evidentiary matters; (5) the APA's interplay with the Civil Practice Act; (6) enforcement authority; and (7) filing hearing requests. The subcommittee proceeded to lead a discussion on each of these areas of reform.

(1) Final Decision Authority

The subcommittee discussed the proposal to give OSAH authority to issue final decisions for all contested cases that appear before its administrative law judges (ALJs).

State Representative Mary Margaret Oliver inquired about the Model APA's stance on final decisions, as well as the most recent example of legislation that eliminated final agency review.

Judge Malihi noted that the national trend is toward giving central panels final decision authority.

Georgia Supreme Court Justice Nels Peterson asked for thoughts about reviewing final decision authority on a case-by-case basis.

Judge Malihi mentioned the Professional Standards Commission (PSC) as one example of an agency with unique cases, in that the PSC only reviews OSAH's decisions if OSAH reverses the agency action.

Judge John Gatto, of the U.S. Occupational Safety and Health Review Commission, commented that current problems exist when agencies have the ability to overturn a separate panel's decision.

Justice Peterson noted that the issue depends on the purpose of OSAH review; for instance, is there a difference between licensing cases, in which policy issues are intricately intertwined?

OSAH Judge Ronit Walker observed that initial decisions ultimately lead to a time delay.

Representative Oliver echoed that she has seen a lack of a timetable for agencies to send cases to OSAH, which is a way for the agency to delay or deny a decision's implementation. Her personal inclination was to accept the elimination of an agency's final decision authority.

Justice Peterson asked Larry O'Neal, chief judge of the Tax Tribunal, to share his perspective on final decision authority.

Judge O'Neal commented that parties often have concerns regarding the ability of an agency to overturn OSAH's decision. He cited positive outcomes with the final decision authority recently given to the Tax Tribunal, as the cases are litigated more thoroughly. Judge O'Neal also stated that superior courts are often reluctant to sit as appellate courts.

Justice Peterson next inquired into the list of agencies for which OSAH has heard hearings.

Judge Malihi noted that the Department of Driver Services (DDS) is one of the biggest agencies.

Representative Oliver observed that DDS, the Department of Child Support Services (DCSS), and DHR are all huge agencies, and that DHR does not see the fairness in agency final review.

(2) Judicial Review

The meeting next turned to reforms on judicial review. Namely: whether final decisions under the APA should be directly appealed to the Georgia Court of Appeals, rather than superior courts.

Representative Oliver expressed her opposition to eliminating reviews by superior courts.

Justice Peterson referred to constitutional questions regarding the appellate court's jurisdiction in APA matters.

Judge Gatto stated that superior courts are trial courts and are not trained to be appellate courts. At the federal level, agency matters are directly appealed to the circuit courts of appeal.

Jessica Gabel Cino, dean of academic affairs at Georgia State University College of Law, provided that in bankruptcy cases, Article I court decisions are appealed to Article III courts.

A member of the public asked whether the call for eliminating the level of superior court review arose from superior courts themselves. Judge Malihi answered in the negative.

Fulton County Superior Court Judge Shawn LaGrua commented that superior court reviews are not time-consuming. She observed that most of the reviews are not problematic, particularly since the "any evidence" standard is applied and it is rare to hear from the parties.

Judge LaGrua acknowledged that superior courts have a tendency to let judicial reviews pile up.

Justice Peterson referred to the Court of Appeals having a rule aimed at preventing reviews from accumulating in a backlog.

Judge Gatto cited a workers' compensation statute that makes an agency decision final if the superior court fails to review it within a certain period of time.

Judge LaGrua expressed reservations about timelines for superior court review, noting that they run the risk of letting decisions become final without review.

Justice Peterson commented that it may not be realistic to impose timelines on all types of cases, as many range in complexity.

(3) Jurisdiction

The subcommittee next discussed the proposal to make all agencies subject to the APA and, accordingly, to OSAH's jurisdiction with regard to contested cases. Possible exceptions could include agencies headed by elected or constitutional officers (such as Labor, Agriculture, and the Public Service Commission).

Senior Assistant Attorney General Russ Willard asked whether decisions regarding licensing and decisions regarding license sanctions should be differentiated. He explained that OSAH currently interacts with the PSC from a sanctioning standpoint only. If full licensing boards were put under the APA, it would constitute a "sea change," because agencies would no longer control who was licensed in the state. Mr. Willard also noted that agency staffs also have experts in their respective fields.

Justice Peterson suggested that more specific information is needed on "one-off" agencies, for whom jurisdiction changes might have deeper and broader implications.

Representative Oliver mentioned the Georgia Composite Medical Board as one such licensing board for which OSAH issues initial decisions. She also requested information on the number of licensing boards.

Judge Gatto mentioned that the statutory language regarding license revocations and the denial of license applications is similar. He noted that any policy decisions can be handled through regulation. As a matter of fundamental fairness, it is important that one of the parties in the cases should not be allowed to change the decision.

Justice Peterson reiterated that APA jurisdiction makes sense for some case types, but not without examining the specifics of each type of case. He also called for more than one reform option to be drafted.

Justice Peterson asked about OSAH's caseload for 2016. Judge Malihi responded that OSAH had approximately 42,000 cases in FY2016.

Bill Clark, of the Georgia Trial Lawyers Association, asked whether any agencies have been brought into this discussion for reform. Judge Malihi responded that the subcommittee planned to reach out, and one member of the council was going to contact the State Board of Workers' Compensation. Mr. Clark mentioned that many practitioners want a definitive application of the APA and would commend the adoption of the APA by the Workers' Comp Board. Mr. Clark also stated that he wanted the Civil Practice Act and Georgia's Evidence Code to apply as well.

Representative Oliver raised the issue of how an expanded APA would affect the Board of Pardon and Paroles. Judge Gatto mentioned the board could be exempted for rule-making purposes, and Justice Peterson suggested checking with the Department of Corrections (DOC) on the board's volume of cases.

Mr. Willard suggested identifying as exceptions to the APA any agencies with constitutional authority, including the Board of Regents and the Board of Pardons and Paroles. Certain other agencies already have been exempted from the APA, including a partial exemption for the Department of Education and its non-justiciable cases.

Justice Peterson proposed that the focus of expanded APA jurisdiction should be on agencies that oversee quasi-judicial cases, such as unemployment cases. In light of this consideration, thought should be given as to why exceptions are needed for agencies led by a constitutional officer.

Judge Malihi stated that, based on discussions with agency heads, hearing officers are not necessarily lawyers. He cited officers with the DOC or the Department of Labor (DOL).

Representative Oliver echoed Judge Malihi's point by observing that many more hearing officers were non-lawyers at the time she started her practice. However, that changed when OSAH was created. She cited the DOL as an example.

Judge LaGrua commented that the use of non-attorney hearing officers for the DOC is fairly new and has not been challenged yet.

Justice Peterson cited the need for "precise framing" with regard to any exceptions to an expanded APA jurisdiction.

Judge Gatto recommended that cases related to rate-making or price-fixing should not fall under the APA, as they resemble legislative functions.

(4) Evidentiary Matters

The subcommittee then turned its attention to two reform proposals concerning evidentiary rules and proceedings.

A. Rules of Evidence

This proposal sought to have the APA explicitly state that the Georgia Evidence Code, O.C.G.A. § 24-1-1 *et seq.*, applies in all hearings conducted pursuant to the APA. From there, the APA may note any specific exceptions to the Evidence Code, as needed.

Justice Peterson asked Judge O'Neal how the Tax Tribunal handled the matter of evidentiary rules.

Judge O'Neal responded that under the Tax Tribunal's charter, it could adopt its own rules of evidence.

Justice Peterson also asked Judge LaGrua whether she felt the proposed reform would make matters more clear.

Judge LaGrua responded that she believed things would be significantly easier. Justice Peterson commented that the reform appeared to be a “no-brainer.”

B. Telephone Hearings

This proposal would amend the APA so that, instead of requiring consent from all parties, the decision to allow testimony of one or more witnesses by telephone or video would be at the ALJ’s discretion, upon a showing of good cause. Additionally, the phrase “remote telephonic communication” would be revised to encompass any type of remote conferencing, as follows: “remote-communication devices such as telephones or video conferencing.”

Representative Oliver asked about the types of objections raised against telephone hearings.

In response, Judge Malihi mentioned that some witnesses must travel great distances for very short testimonies, and other parties will attempt to hold up a case by not consenting to the remote testimony. The decision to allow remote testimony, under the reform, would be at the judges’ discretion.

Representative Oliver asked whether the reform would require video, as opposed to audio only. Judge Malihi confirmed that the proposal would still allow audio-only remote testimony. Representative Oliver remained nervous about the idea of a hearing conducted solely by telephone. She also inquired to the Model APA’s provisions concerning remote testimony.

Justice Peterson advised crafting a rule that would meet Confrontation Clause principles. While the Confrontation Clause does not apply in these types of cases, many of these cases have a distinct accuser.

Judge LaGrua contended that the use of video testimony at least allows the ALJ and the other parties to see what’s going on during the hearing, and to observe any coaching or facial expressions.

Dean Cino echoed that video plays a large role in credibility judgments, which are relied upon when cases go up on appeal.

Judge LaGrua advised crafting a rule similar to the one used to determine whether video testimony by video for a child is appropriate. She also explained that so far in her court, civil cases have not used telephone testimony. Skyping was attempted, but it did not work out.

Mr. Willard commented that procedural safeguards would need to be implemented. Logistical concerns, such as the number of witnesses and distance they travel, would have to be considered.

Judge Gatto noted that if a witness were crucial to the case, then the hearing would be held closer to the parties involved, as it would be more important to have the witness there in person.

Judge Malihi suggested that only video testimony would be allowed for certain types of cases, such as licensing cases where credibility judgments are key.

Justice Peterson proposed applying a higher standard when deciding to allow remote testimony, and Dean Cino referred to the standard for unavailable witnesses in the Federal Rules of Evidence.

(5) Civil Practice Act (CPA)

The subcommittee proceeded to discuss a proposal to amend the APA so that it specified that the CPA, O.C.G.A. § 9-11-1 *et seq.*, applies in all hearings conducted pursuant to the APA. Any exceptions to the CPA (e.g. discovery rules) can be explicitly listed in the APA's provisions, as opposed to promulgated rules.

Judge Malihi observed that the primary exception would be for discovery provisions, as there is very limited discovery in cases held under the APA.

Representative Oliver stated she is in favor of setting time limits for agencies to bring cases.

Justice Peterson expressed the subcommittee should avoid disadvantaging unrepresented parties by importing "pitfalls for the unwary." He also commented that many of the agency's documents could be acquired through open-records' requests.

A member of the public made the comment that there is no automatic six-month discovery process under the APA, and that the subcommittee should be careful not to impose a full-blown civil discovery process.

(6) Enforcement Authority

The subcommittee next addressed proposals to revise the APA so as to give OSAH ALJs the power to (a) enforce subpoenas when parties do not appear (through the imposition of fines); and (b) sanction parties by imposing fees.

Representative Oliver asked whether the sanctions proposed included incarceration. Judge Malihi responded in the negative, as that was specifically excluded from the proposal. Orders for contempt would still go to superior court.

Justice Peterson commented that the legality of the enforcement authority would need to be considered, in light of the executive branch's role.

Representative Oliver raised a concern about the unrepresented litigant, as they may act emotionally.

Judge Malihi referred to the Workers' Compensation Board's enforcement authority.

Judge LaGrua observed that she could not remember a case for sanctions certified to superior court.

Justice Peterson asked Mr. Willard about how the Ethics Commission, which he represents, collects its fines. Mr. Willard responded that the fine is not immediately collectible; instead, the commission has to go to superior court.

Judge Gatto mentioned that the current APA grants a hearing officer the power to issue writs and impose fines.

Judge O'Neal discussed penalties in the context of the Tax Tribunal.

(7) Filing Hearing Requests

Lastly, the subcommittee reviewed two proposed reforms regarding the filing of hearing requests. The first option would revise the APA so that agencies had to refer to OSAH all hearing requests by a certain deadline. The second option would allow parties to file hearing requests directly with OSAH, as opposed to the agencies.

Justice Peterson asked for an explanation of the delay in transferring cases to OSAH. Mr. Willard responded that he could not speak to the tens of thousands of cases that do not go through his office. However, he noted that certain cases must be differentiated when it comes to deadlines and timetables.

Mr. Willard also noted that many cases seek settlements, which may delay their delivery to OSAH. As many as 80-90% of cases that cross the agency desk will never even make it to OSAH, as they will be settled.

Representative Oliver asked about the timeline for the medical board's emergency powers to suspend a doctor's license. Judge Malihi responded that cases involving such emergency powers already have timelines set.

Judge LaGrua commented that, when considering timelines, it should be remembered that often settlements go back to the boards. The boards only meet three times per year, and often the Attorney General's Office is dealing with entities that have to get approval from multiple boards (such as county and state boards).

Judge Gatto commented that only the board would have final decision authority.

Justice Peterson proposed that the two options be combined, so that it stated there was a deadline by which the agency hasn't forwarded the case with OSAH, then the party has the option of filing with OSAH on its own.

Judge O'Neal mentioned that there is a standing remand order for sixty days that may be waived, which essentially acts as an order for mediation. He suggested that OSAH perhaps could gain the authority to remand cases.

Justice Peterson expressed that of 42,000 cases in OSAH, surely 40,000 were simple enough so that deadlines could be imposed.

Representative Oliver asked whether every agency could be asked how many cases they refer to OSAH, and get an idea of their timetables. A notice could be sent out with a few questions, also asking why the agencies believe they need final decision authority, and why timetables shouldn't be imposed.

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Following the discussion, a final call was made for public comment. Judge Malihi announced that the next subcommittee meeting date and time were TBA.

Meeting adjourned at approximately 10:30 AM.